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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENNETH DALE WALLACE, Defendant and Appellant.	H037385 (Santa Clara County Super. Ct. No. 207454)

Following a court trial, the court found true beyond a reasonable doubt that Kenneth D. Wallace was a sexually violent predator (SVP) under the Sexually Violent Predator Act (SVPA). (See Welf. & Inst. Code, § 6600 et seq.)[1] By order filed September 15, 2011, the court ordered him committed for an indeterminate term to the custody of the California Department of Mental Health (DMH).

On appeal, Wallace raises multiple contentions, which we find without merit. Accordingly, we will affirm the order of commitment.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

I

Procedural History

A petition to extend appellant's commitment as an SVP was filed on January 5, 2007. On November 20, 2009, after the probable cause hearing, the court made the requisite findings and set the matter for jury trial.

On January 19, 2010, appellant filed a motion for new evaluations and a new probable cause hearing pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509 on the ground that the evaluations prepared by DMH evaluators prior to February 11, 2009, when the DMH adopted a new protocol, were prepared under an invalid protocol. *In re Ronje* held that the 2007 standardized assessment protocol was an invalid underground "regulation" under the Administrative Procedure Act (APA) (*id*. at p. 517) and *Ronje* was entitled to new evaluations using a valid standardized assessment protocol and a fresh probable cause hearing under section 6602, subdivision (a), based on the new evaluations (*id*. at p. 519). The trial court denied the motion.

On May 7, 2010, appellant filed a motion to dismiss the SVP petition on the ground that Drs. Sreenivasan and Nair had used the DMH's 2009 assessment protocol in updating their evaluations and testifying at the probable cause hearing. Appellant argued that the 2009 protocol is invalid because it is not a bona fide "standardized assessment protocol" within the meaning of section 6601, subdivision (c), the 2009 protocol violated his statutory and constitutional rights, and the appropriate remedy was dismissal of the petition. The trial court denied the motion.

Appellant waived a jury trial and his presence at trial. On September 15, 2011, following a court trial, the court found beyond a reasonable doubt that appellant is an SVP. It ordered appellant committed for an indeterminate term.

II

SVP Commitment Process

We briefly summarize the SVP commitment process. "The process begins when the secretary of the Department of Corrections and Rehabilitation (DCR) determines that a person in custody because of a determinate prison sentence or parole revocation may be a sexually violent predator. If such an initial determination is made, the secretary refers the inmate for an evaluation." (*In re Lucas* (2012) 53 Cal.4th 839, 845.) "After the secretary's referral, the inmate is screened by the DCR and the Board [of Parole Hearings (Board)] to determine whether the person is *likely* to be an SVP. If the DCR and the Board conclude that is the case, the inmate is referred for full evaluation by the State Department of Mental Health (DMH). (§ 6601, subd. (b).)"[2] (*Ibid*.)

"A full evaluation is done by two practicing psychiatrists or psychologists, or by one of each profession. (§ 6601, subd. (d).) If one evaluator concludes the inmate meets the SVP criteria, but the other evaluator disagrees, two more independent evaluators are appointed. (§ 6601, subd. (e).) A petition for commitment may not be requested unless the initial two evaluators appointed under subdivision (d), or the two independent evaluators appointed under subdivision (e), agree that the inmate meets the commitment criteria. (§ 6601, subds. (d), (f).)" (*Ibid*.) "If, after the full evaluation is completed, the DMH concludes that the inmate is an SVP, the director of the DMH requests that a petition for commitment be filed by the district attorney or the county counsel of the county where the inmate was convicted. If upon review that official concurs, a petition for commitment is filed in the superior court. (§ 6601, subds. (h), (i).)" (*Id*. at p. 846.)

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[2] In 2012, section 6601 was amended and "State Department of State Hospitals" was substituted for "State Department of Mental Health" and "Director of State Hospitals" was substituted for "Director of Mental Health" throughout the section. (Stats. 2012, ch. 24, § 139, pp. 1029-1031, see 2012, ch. 24, § 208, p. 1056, eff. June 27, 2012.)

With regard to the full evaluation prior to the filing of a petition, former section 6601, subdivision (c), provided: "The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder."[3] (Stats. 2008, ch. 601, § 2, p. 3432, eff. Sept. 30, 2008.)

A commitment petition proceeds to trial only if the requisite findings are made at a probable cause hearing. (See § 6602, subd. (a); *Cooley v. Superior Court* (2002) 29 Cal.4th 228.) "[T]he only purpose of the probable cause hearing is to test the sufficiency of the evidence supporting the SVPA petition. [Citation.]" (*Id*. at p. 247.) ". . . If the judge determines that there is probable cause, the judge shall order that the person remain in custody in a secure facility until a trial is completed . . . ." (§ 6602, subd. (a).)

At trial, the court or jury must "determine whether, beyond a reasonable doubt, the person is a sexually violent predator." (§ 6604; see former § 6604 [Prop. 83, § 27, approved Nov. 7, 2006, eff. Nov. 8, 2006].) If the court or jury determines that the person is a sexually violent predator, the person is committed for an indeterminate term. (*Ibid*.)

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[3] See footnote 2, *ante*.

III

Discussion

A. *2009 Assessment Protocol*

The DMH promulgated the "Standardized Assessment Protocol for Sexually Violent Predator Evaluations"with an "issue date" of February 11, 2009 ("2009 Protocol"). The 2009 Protocol had been adopted at the time of appellant's probable cause hearing in 2009.

As indicated, appellant brought a pretrial motion to dismiss the pending SVP petition because the evaluators, Drs. Sreenivasan and Nair, had used the DMH's 2009 Protocol in testifying at the probable cause hearing and in conducting their updated clinical evaluations, which were admitted into evidence at that hearing. In support of the motion, he argued that the 2009 Protocol is "subjective, unreliable and in contravention of the Legislative mandate requiring a 'standardized assessment protocol.' "

The issues on the motion were framed as follows: (1) "Where the law mandates that all SVP evaluations are to be conducted pursuant to a 'standardized assessment protocol,' and where the protocol used by respondent's evaluators expressly eschews any specific procedures to be followed or any designated risk assessments or tests to be used, were respondent's evaluations conducted pursuant to an invalid protocol?" and (2) "Where the protocol used to evaluate respondent was not a bona fide 'standardized assessment protocol,' and thus was an invalid protocol, was [*sic*] respondent's statutory and constitutional rights violated, including his right to due process of law?" He claimed that the 2009 Protocol is not a valid "standardized assessment protocol" within the meaning of section 6601, subdivision (c), because it does not spell out a detailed or uniform procedure for evaluators to follow when performing SVP evaluations.

In ruling on the motion, the trial court considered the declarations of Drs. Wollert and Halon in support of the motion and the declaration of Dr. Phenix in support of

opposition to the motion. The court found that "the 2009 protocol comports with the intention of the legislature and comports with the accepted definition of the words, standardized assessment protocol." It stated: "The 2009 protocol recognizes that individuals differ in psychological function, issues of mental health and level of risk for sexual reoffense. In short the protocol acknowledges psychological complexities of each human being. As Dr. Phenix says in her declaration, '. . . a rigid protocol would be to the detriment of good clinical judgment and accurate risk assessment.' " It found "the declaration of Dr. Amy Phenix, a well recognized expert in this area, to be extremely persuasive on this issue." The court ruled that "the 2009 Standardized Assessment Protocol meets the requirements of the statute, is valid, and therefore none of the respondents before this court on this motion have suffered any due process violation" and denied the motion.

Appellant is arguing on appeal that the 2009 Protocol does not satisfy the requirements of a "standardized assessment protocol" mandated by section 6601, subdivision (c). He asserts that the "DMH evaded the requirements of the APA by ridding the 'protocol' of its specific content" rather than "subjecting the full standardized assessment protoctol [previously] in use by the DMH to the review process required by the APA . . . ." Appellant contends that, in issuing and revising its lengthy predecessor protocols, the DMH "recognized the type of specificity required for a true, updated 'standardized assessment protocol' mandated in section 6601, subdivision (c)." He argues: "The only thing that changed between the promulgation of these detailed protocols and the 2009 Protocol, was the requirement of scrutiny necessitated by the OAL and the APA. It was only then that sixty-eight pages shrunk to a regulation consisting of two paragraphs and a 'protocol' stripped of all specificity."

The 2009 protocol is six pages long. It reviews applicable statutory and case law and is largely uncodified. The protocol states in its introduction: "This protocol cannot

prescribe in detail how the clinician exercises his or independent professional judgment in the course of performing SVP evaluations. Since the exercise of independent, professional clinical judgment is required, this protocol is not, and cannot be, a detailed, precise step-by-step procedure like the kind of procedure that might apply to the chemical analysis of an unknown substance."

The 2009 Protocol is partly codified in section 4005 of the California Code of Regulations, title 9, which provides: "The evaluator, according to his or her professional judgment, shall apply tests or instruments along with other static and dynamic risk factors when making the assessment. Such tests, instruments and risk factors must have gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders and be appropriate to the particular patient and applied on a case-by-case basis. The term 'professional recognition or acceptance' as used in this section means that the test, instrument or risk factor has undergone peer review by a conference, committee or journal of a professional organization in the fields of psychology or psychiatry, including, but not limited to, the American Psychological Association, the American Psychiatric Association, and the Association for the Treatment of Sexual Abusers."[4] The 2009 Protocol includes this codified language.

The 2009 Protocol recommends, in an uncodified portion, that evaluators be "knowledgeable and familiar with the literature, studies, and tests or instruments used in the field of evaluation and diagnosis of sex offenders, as well as the latest developments in these areas." It also advises evaluators to, among other things, "obtain, review, and

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[4] All further references to regulations are to the California Code of Regulations, title 9. Chapter 15 of the regulations is entitled "Assessment of Sexually Violent Predators" and presently contains only two sections, section 4000 and 4005. Section 4000 of the regulations states: "This chapter applies to evaluators performing an assessment to determine whether a person is a sexually violent predator pursuant to Welfare and Institutions Code § 6600 et seq."

consider all relevant information and records that bear upon the case and be prepared to testify and undergo cross examination regarding these sources of information and how they contributed to the conclusions reached in the evaluation."

Appellant repeatedly refers to the APA (Gov. Code, § 11340 et seq.) and states that the Office of Administrative Law (OAL) "did not approve, and was not asked to approve, the '2009 Protocol.' " "The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subds.(a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)) . . . ." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.)

The OAL reviews proposed regulations using six specified standards: "(1) Necessity. [¶] (2) Authority. [¶] (3) Clarity. [¶] (4) Consistency. [¶] (5) Reference. [¶] (6) Nonduplication." (Gov. Code, § 11349.1, subd. (a).) Those terms are defined by statute.[5] (Gov. Code, § 11349.) The office does not review and approve

[5] Government Code section 11349 provides: "The following definitions govern the interpretation of this chapter: [¶] (a) 'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. [¶] (b) 'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. [¶] (c) 'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. [¶] (d) 'Consistency' means being in harmony with, and not in

guidelines or policies that do not qualify as a "regulation." (See Gov. Code, §§ 11342.600, 11349.1, subd. (a).) The Legislature's intent is that "neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations." (Gov. Code, § 11340.1; see Gov. Code, § 11349.1, subd. (c) ["The regulations adopted by the office shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations"].)

In any case, appellant did not argue below, and he is not arguing now, that any uncodified provision of the 2009 protocol promulgated by the DMH was required to be adopted as a regulation pursuant to the APA and is void for failure to comply with the APA. (See Gov. Code, §§ 11340.5, subd. (a) ["No state agency shall issue, utilize, enforce, or attempt to enforce" any regulation unless it "has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter"].)[6] Rather, as indicated, appellant contends that the 2009 protocol was not a "standardized assessment protocol" as that phrase is used in section 6601, subdivision (c).

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conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. [¶] (e) 'Reference' means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. [¶] (f) 'Nonduplication' means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation."

[6] We take judicial notice of the OAL Determination No. 19. (Evid. Code, §§ 452, subd. (c), 459.)

Appellant argues as follows: "The requirement of specificity is implicit in the legislative mandate that the 'standardized assessment protocol' be 'developed and *updated* by the Department of Mental Health.' (§ 6601, subd. (c) emphasis added.) . . . The 2009 Protocol defies the need for updating because it says nothing more specific than what is already in the statute. Furthermore, it is inconsistent with the statute because instead of establishing the standards mandated under section 6601, subdivision (c), DMH tells evaluators to seek validation of their methods through outside agencies." Appellant also points out the specificity of earlier protocols with regard to particular tests and actuarial instruments to be used by evaluators for assessing future recidivism.

"Statutory interpretation is a question of law that we review de novo. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531 . . . .) 'Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 . . . .)" (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.)

The 2009 protocol, as partly codified in section 4005 of the regulations, requires evaluators to conform to peer-reviewed, professional norms in conducting their SVPA evaluations. This requirement does not merely duplicate the statute. In addition, the protocol impliedly recognizes that the field of diagnosis and evaluation of sex offenders

is evolving, stating that "evaluators have primary responsibility for obtaining knowledge of new developments in the field and how and when to make use of them." It states that the "DMH will attempt to notify evaluators of new developments when they become known to DMH, and DMH will provide informational trainings from time to time when resources permit." Although the DMH implicitly interpreted the statutory meaning of "standardized assessment protocol" in promulgating the protocol, the protocol essentially constitutes quasi-legislative rulemaking.

"It is a ' "black letter" proposition' that there are two categories of administrative rules—quasi-legislative rules and interpretive rules—and that the distinction between them derives from their different legal foundations and ultimately from the constitutional doctrine of the separation of powers. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10 . . . .) Quasi-legislative rules are those that the agency promulgates as part of the lawmaking power the Legislature has delegated to it, and are subject to 'very limited' review. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1012 . . . .) ' "The courts exercise limited review of legislative acts by administrative bodies out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." ' (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667 . . . .) Rules that interpret a statute, on the other hand, receive less judicial deference. (*Sara M., supra*, 36 Cal.4th at p. 1012 . . . .)" (*In re Cabrera* (2012) 55 Cal.4th 683, 687-688.) "Of course, administrative rules do not always fall neatly into one category or the other; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature. [Citations.]" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, fn. 3 (*Yamaha*).)

"When a court assesses the validity of [quasi-legislative] rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end."[7] (*Yamaha, supra*, 19 Cal.4th at pp. 10-11.) "The substitution of the judgment of a court for that of the administrator in quasi-legislative matters would effectuate neither the legislative mandate nor sound social policy." (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 835.)

"The quasi-legislative standard of review 'is *inapplicable* when the agency is not exercising a discretionary rule-making power, but merely *construing* a controlling statute. The appropriate mode of review in such a case is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction. [Citation.]' [Citations.]" (*Yamaha, supra*, 19 Cal.4th at p. 12.) "If an agency has adopted an interpretive rule in accordance with Administrative Procedure Act provisions — which include procedures (e.g., notice to the public of the proposed rule and opportunity for public comment) that enhance the accuracy and reliability of the resulting administrative 'product' -- that circumstance weighs in favor of judicial deference. However, even formal interpretive rules do not command the same weight as quasi-legislative rules. Because ' "the ultimate resolution of . . . legal questions rests with the courts" ' [citation], judges play a greater role when reviewing the persuasive value of interpretive rules than they do in determining the validity of quasi-legislative rules." (*Id*. at p. 13.)

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[7] "Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." (Gov. Code, § 11342.1.) "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

The issue of the proper interpretation of the statutory phrase "standardized assessment protocol" used in section 6601, subdivision (c), is ultimately this court's responsibility. (See *American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 462.) We observe, however, that the Legislature has provided no specific guidelines regarding the methodology to be used in evaluating whether persons qualify as SVP's. Section 6601 does not define "standardized" or "protocol." At the time of appellant's 2009 probable cause hearing, the former Department of Mental Health (now the Department of State Hospitals) was the agency with the recognized expertise in evaluating whether a person is an SVP and providing treatment. (See former § 6600.05, subd. (b) [Stats. 2001, ch. 171, § 29.5, p.1850, eff. Aug. 10, 2001] ["The State Department of Mental Health shall be responsible for operation of the [commitment] facility, including the provision of treatment"]; former § 6605, subd. (a) [Prop. 83, § 29, approved Nov. 7, 2006, eff. Nov. 8, 2006] ["A person found to be a sexually violent predator and committed to the custody of the State Department of Mental Health shall have a current examination of his or her mental condition made at least once every year. The annual report shall include consideration of whether the committed person currently meets the definition of a sexually violent predator . . . ."], former § 6606, subd. (a) [Stats.2005, ch. 80, § 20, eff. July 19, 2005] ["A person who is committed under this article shall be provided with programming by the State Department of Mental Health which shall afford the person with treatment for his or her diagnosed mental disorder"].)

While the lengthier and more detailed predecessor protocols indicate that the DMH had implemented section 6601, subdivision (c), in a different manner prior to the 2009 Protocol, those earlier versions do not necessarily establish that California Legislature intended a "standardized assessment protocol" to fit only that model. Perhaps the DMH decided that the prior protocols had proved too cumbersome and unresponsive to ongoing developments in the specialized field of evaluating and treating SVPs. The

legal question is whether the statute prevented the DMH from moving to the 2009 protocol.

Appellant has not cited any legislative history indicating that the Legislature intended any specific degree of standardization. We have no reason to believe that the Legislature was not leaving the degree of standardization and detail to the expertise of the DMH. As the U.S. Supreme Court has recognized, the federal "Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules" and "the science of psychiatry . . . is an ever-advancing science. . . . [Citations.]" (*Kansas v. Crane* (2002) 534 U.S. 407, 413 [122 S.Ct. 867].)

We conclude that the 2009 Protocol, as partly codified in section 4005 of the regulations, qualifies as a "standardized assessment protocol" within the meaning of section 6601, subdivision (c), because it provides sufficiently specific direction to SVP evaluators, who are required to exercise their professional judgment, to enable them to perform their function in the commitment process.[8]

B. *Pretrial Motion to Exclude Hearsay Evidence of 1997 Colorado Sex Offenses*

Appellant contends that the admission of hearsay evidence pertaining to 1997 Colorado sexual offenses against a minor violated his statutory rights to exclude that evidence and his due process right to cross-examine witnesses. He maintains that the evidence was admitted for the truth of the matter stated as well as for the nonhearsay purpose of explaining the basis of expert opinion.

Before trial, appellant moved to exclude all hearsay evidence in the form of police reports, probation reports, psychological evaluations, prison records, parole revocation reports, and state hospital records because the evidence was of questionable reliability,

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[8] Even assuming that evaluators' use of the 2009 Protocol constituted an error or irregularity in the SVPA proceedings (cf. *In re Ronje*, *supra*, 179 Cal.App.4th at p. 517), that assumption does not establish that the concurring evaluators misapplied the law defining whether a person is an SVP or reached invalid conclusions regarding appellant.

unduly prejudicial, and its probative value was outweighed by the risk that the jury might improperly consider it independent proof of the matters stated and be unduly prejudiced. Evidence of 1997 Colorado offenses against a 14-year-old runaway boy was among the evidence appellant sought to exclude. In support of the motion, appellant also argued that "even if the proffered hearsay statement falls under a statutory exception to the rule against hearsay, it must meet constitutional scrutiny under the right to due process and the right to confront and cross-examine witnesses." Although the moving papers claimed that the offenses did not result in conviction, appellant's counsel told the court at the hearing on the motion that he had learned the conduct had actually led to a conviction. The court denied the motion as to the 1997 Colorado offenses.

At trial, Shoba Sreenivasan, a licensed psychologist, testified as an expert in the diagnosis of mental disorders, sexual recidivism, risk assessment and sexual offender treatment. She had evaluated appellant and reviewed his criminal history and mental health records. Dr. Sreenivasan diagnosed appellant with multiple mental disorders, including paraphilia not otherwise specified with pedophilia and hebephilia features, alcohol dependence, and personality disorder not otherwise specified with antisocial traits. In her opinion, these mental disorders predisposed appellant to reoffend in a sexually violent predatory manner. Dr. Sreenivasan explained, among other things, the significance of the 1997 sexual assault of 14-year-old Anthony to her opinions. She concluded that appellant posed "a serious and well-founded risk [of committing] future acts of sexually violent and predatory behavior."

Mohan Nair, a psychiatrist, also testified as an expert at trial. He had reviewed multiple records, including police reports relating to sexual assault of a 14-year-old minor named Anthony in 1997. He had concluded that appellant suffered from mental disorders that predisposed him to recommit sexually violent predatory offenses. Dr. Nair

diagnosed appellant with pedophilia with a non-exclusive attraction to boys, alcohol dependence with institutional remission, and a personality disorder with antisocial traits.

In reaching his diagnosis of pedophilia, Dr. Nair considered, among other circumstances, the August 1997 offenses in which appellant gave Anthony large amounts of alcohol, he had the minor orally copulate him, and he attempted to sodomize the minor. Dr. Nair indicated that appellant had written a confession to that effect.

An exhibit listing appellant's offenses was admitted into evidence. As to the offenses occurring on August 7, 1997 and August 8, 1997, the exhibit stated: "CO offense, Sexual Assault on Child. Gets V (Anthony M., 14) drunk on both occasions. On 8/7 D put hand down V's pants and touched buttocks. On 8/8 D put his penis in V's mouth and attempted anal sex. Pled guilty, 5 years supervised probation."

Expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) If the "threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.]" (*Ibid.*) "[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]" (*Id*. at p. 619.)

"[P]rejudice may arise if, ' "under the guise of reasons," ' the expert's detailed explanation ' "[brings] before the jury incompetent hearsay evidence." ' [Citations.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 918-919.) "Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.]" (*Id*. at p. 919.) "Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter

whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]" (*Ibid*.)

Appellant has not demonstrated that the evidence regarding the 1997 Colorado sexual assault of Anthony was admitted for the truth of the matter stated rather than for the nonhearsay purpose of showing the basis of the experts' opinions. (See Evid. Code, § 1200, subd. (a) [definition of "hearsay"]; see also Sen. Com. on Judiciary com., 29B, Pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1200, p. 4 [A "statement that is offered for some purpose other than to prove the fact stated therein is not hearsay. [Citations.]"].) Moreover, we have no reason to believe the trier of fact, in this instance the court, did not fully understand the limited purpose of that evidence.

Reviewing courts "apply the deferential abuse of discretion standard to a trial court's rulings under Evidence Code section 352. [Citations.]" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.) Since a trier of fact's need for information sufficient to evaluate an expert opinion may conflict with an SVP's interest in avoiding substantive use of hearsay, disputes in this area must generally be left to the trial court's sound judgment. (Cf. *People v. Montiel*, *supra*, 5 Cal.4th at p. 919.) Unless there is a manifest abuse of discretion resulting in a miscarriage of justice, rulings under Evidence Code section 352 will not be disturbed on appeal. (*People v. Thomas* (2011) 51 Cal.4th 449, 485.)

The challenged evidence was clearly relevant to the trier of fact's evaluation of the expert's opinion. (See *People v. Montiel*, *supra*, 5 Cal.4th at p. 919; see also Evid. Code, §§ 210 [defining "relevant evidence"], 801, subd. (b) [permissible bases upon which expert opinion may be founded].) Since uncontroverted evidence at trial shows that appellant confessed to committing sex crimes against Anthony and it is undisputed that the conduct resulted in a conviction, there appears to be no real issue of reliability either.

"For purposes of Evidence Code section 352, evidence is considered unduly prejudicial if it tends to evoke an emotional bias against the defendant as an individual

and has a negligible bearing on the issues. (*People v. Padilla* (1995) 11 Cal.4th 891, 925 . . . .) Put another way, evidence should be excluded ' " 'when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 439 . . . .)' (*People v. Howard* (2010) 51 Cal.4th 15, 32 . . . .)" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1091.) Appellant has not demonstrated that the challenged evidence, which merely summarized the offenses, was unduly prejudicial or that the trial court abused its discretion in admitting it over his evidentiary objections. Moreover, since the court was the trier of fact and presumably understood the limited purpose of the evidence (Evid. Code, § 664), there is no likelihood that the challenged evidence was used for an illegitimate purpose.

People v. Otto (2001) 26 Cal.4th 200, which appellant cites, "addressed section 6600, subdivision (a)(3), which authorizes the admission of documentary evidence—including preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health—to establish the details surrounding the commission of predicate offenses." (*People v. Allen* (2008) 44 Cal.4th 843, 863.) In that case, the California Supreme Court considered whether section 6600, subdivision (a)(3), "allows the admission of multiple hearsay that does not fall within any exception to the hearsay rule." (*People v. Otto*, *supra*, 26 Cal.4th at p. 206.) It determined that section 6600, subdivision (a)(3), constitutes an express statutory exception to the hearsay rule. (*Id*. at pp. 206-209.)

Appellant acknowledges that the evidence concerning Anthony was not offered to prove a predicate offense. Consequently, *Otto* is not relevant to our analysis whether the

court abused its discretion in admitting the challenged evidence over hearsay and Evidence Code section 352 objections.

In *Otto*, the Supreme Court did recognize, however, that, although a person being tried as an SVP has no right to confrontation under the state and federal confrontation clauses, "such a right does exist under the due process clause. [Citation.]" (*People v. Otto, supra*, 26 Cal.4th at p. 214.) Appellant now argues that admission of evidence of the Colorado offenses violated his due process right to cross-examine witnesses.

"Hearsay relied upon by experts in formulating their opinions is not testimonial because it is not offered for the truth of the facts stated but merely as the basis for the expert's opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210 . . . ; see also *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57 . . . .)" (*People v. Cooper* (2007) 148 Cal.App.4th 731, 747.) Since the challenged evidence was being admitted for nonhearsay purposes and not for the truth of the matter asserted, the admission of the evidence did not implicate any due process right to confront adverse hearsay declarants. (Cf. *Crawford v. Washington* (2004) 541 U.S. 36, 60, fn. 9 [124 S.Ct. 1354].) Appellant Wallace had the opportunity to cross-examine the People's psychological experts. His due process right to cross-examine witnesses was not violated.

C. *Indeterminate Commitment Does Not Violate Due Process*

Appellant argues that the indeterminate term of commitment violates due process because the procedures under the revised SVPA are insufficient to protect his liberty interest. He reasons as follows: "Part of the evidence admitted at trial established that appellant was 58 ½ years old, and that when he became sixty, the results of his risk assessment would drop significantly from a score 6 to 3 based on the Static-99 R results, and from an 8 to a 5 based on the Static 2002-R. . . . By the time this appeal is decided, it is highly likely that appellant will have reached the age where his likelihood for reoffense will have been substantially reduced. Yet, due to amendments in the SVP law in 2006,

instead of being entitled to a new trial every two years, appellant has been committed indeterminately. This indeterminate commitment violates due process." He maintains that *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*) did not specifically address this situation. Appellant further asserts that, "[n]otwithstanding the principles of *Auto Equity, Inc. v. Superior Court* (1962) 57 Cal.2d 450," his "commitment under sections 6600 et seq. is not the functional equivalent of [an] NGI commitment."

In *McKee*, the appellant "contend[ed] his indefinite involuntary commitment as an SVP under the Act violates his federal constitutional right to due process of law." (*Id*. at p. 1188.) In rejecting that contention, the Supreme Court explained: "Although McKee was not found not guilty by reason of insanity, he has been found beyond a reasonable doubt in his initial commitment to meet the definition of an SVP. That finding is, for present constitutional purposes, the functional equivalent of the NGI acquittal in *Jones*. As in *Jones*, McKee has already been found not only to have previously committed the requisite criminal acts but was found beyond a reasonable doubt to have 'a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' (§ 6600, subd. (a).) Therefore, as in *Jones*, the danger recognized in *Addington* 'that members of the public could be confined on the basis of "some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable" ' or 'for mere "idiosyncratic behavior" ' (*Jones, supra*, 463 U.S. at p. 367, 103 S.Ct. 3043) is greatly diminished. Accordingly, as in *Jones*, the requirement that McKee, after his initial commitment, must prove by a preponderance of the evidence that he is no longer an SVP does not violate due process." (*Id*. at p. 1191.)

The court ultimately concluded: "After Proposition 83, it is still the case that an individual may not be held in civil commitment when he or she no longer meets the

requisites of such commitment. An SVP may be held, as the United States Supreme Court stated under similar circumstances, 'as long as he is both mentally ill and dangerous, but no longer.' (*Foucha v. Louisiana* (1992) 504 U.S. 71, 77, 112 S.Ct. 1780 . . . .) Given that the denial of access to expert opinion when an indigent individual petitions on his or her own to be released may pose a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed, we construe section 6608, subdivision (a), read in conjunction with section 6605, subdivision (a), to mandate appointment of an expert for an indigent SVP who petitions the court for release." (*Id*. at p. 1193.) As construed, the court held that SVPA "does not violate the due process clause." (*Ibid*.)

The *McKee* decision is binding upon and must be followed by this court. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) If appellant is in fact no longer an SVP, he may petition the court for release as statutorily provided.

D. *Indeterminate Commitment Does Not Violate Equal Protection*

Before trial, appellant objected to an indeterminate commitment on equal protection grounds. He unsuccessfully urged the court to suspend proceedings on this issue pending the outcome of *McKee* on remand. The trial court subsequently made the order for commitment "subject to the ultimate decision in [*McKee*]."

Appellant is now claiming that he is similarly situated to other civilly committed persons, none of whom are subject to an indefinite civil commitment. He compares an SVP's indeterminate term to the one-year term of extended commitment for a mentally disordered offender (MDO) (Pen. Code, § 2972), the two-year term of extended commitment for a person found not guilty by reason of insanity (NGI) (Pen. Code, § 1026.5), the two-year term of extended commitment for a mentally disordered sex offender (MDSO) (former §§ 6316.1, 6316.2), and the one-year "mental health" conservatorship under the under Lanterman-Petris-Short (LPS) Act (§§ 5361, 5362). He

contends that in those types of involuntary commitment, "the person has the right to a jury trial at the end of the one or two year commitment, at which the government must sustain its burden by proof beyond a reasonable doubt."

Appellant asserts that strict scrutiny standard of review applies but no compelling state interest justifies the differential treatment of SVP's. Appellant maintains that, "[a]s in *McKee*, the record in the present case is inadequate to determine whether the state has a compelling interest in treating SVPs in a disparate manner." He states that "the proper remedy is reversal, or at the very minimum, remand to the trial court for an evidentiary hearing."

In *McKee*, the California Supreme Court recognized that persons civilly committed as MDO's or persons whose commitments are extended after being found not guilty by reason of insanity (NGI's) are subject to short, definite terms of commitment whereas persons found to be SVP's are committed to an indeterminate term of commitment. (*People v. McKee*, *supra*, 47 Cal.4th at pp. 1202, 1207.) It concluded that SVP's were similarly situated to these other groups of committees. (*Id*. at pp. 1204, 1207.) The court found "no question that, after the initial commitment, an SVP is afforded different and less favorable procedural protections than an MDO." (*Id*. at p. 1202.) It found merit in the contention that NGI's and SVP's are similarly situated for purposes of equal protection. (*Id*. at p. 1207.) The court declared that where groups are similarly situated and "the state makes the terms of commitment or recommitment substantially less favorable for one group than the other, . . . it is required to give some justification for this differential treatment." (*Id*. at p. 1203.)

The Supreme Court explained: "When a constitutional right, such as the right to liberty from involuntary confinement, is at stake, the usual judicial deference to legislative findings gives way to an exercise of independent judgment of the facts to ascertain whether the legislative body 'has drawn reasonable inferences based on

substantial evidence.' [Citations.] . . . Therefore, the legislative findings recited in the ballot initiative do not by themselves justify the differential treatment of SVP's." (*Id*. at p. 1206.)

The Supreme Court concluded in *McKee* that "neither the People nor the courts below properly understood" the People's burden of justifying the differential treatment of SVP's and the People should be given the opportunity to meet that burden. (*Id*. at pp. 1207-1208.) The court remanded the matter to the trial court "to determine whether the People, applying the equal protection principles articulated in [*In re Moye* (1978) 22 Cal.3d 457] and related cases discussed in [its] opinion, can demonstrate the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment."[9] (*Id*. at pp. 1208-1209, fn. omitted.) It stated: "On remand, the government will have an opportunity to justify Proposition 83's indefinite commitment provisions, at least as applied to McKee, and demonstrate that they are based on a reasonable perception of the unique dangers that SVP's pose rather than a special stigma that SVP's may bear in the eyes of California's

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[9] In *In re Moye* (1978) 22 Cal.3d 457, an equal protection claim required the California Supreme Court to compare the class of persons confined as mentally disordered sex offenders (MDSO's) with the class of persons confined after being acquitted of a criminal offense by reason of insanity (NGI's). (*Id*. at pp. 463-465.) Both groups were confined for treatment "in lieu of criminal punishment" (*id*. at p. 463) but the duration of their commitments were different. (*Id*. at pp. 464-465.) The court stated: "Because petitioner's personal liberty is at stake, the People concede that the applicable standard for measuring the validity of the statutory scheme now before us requires application of the strict scrutiny standard of equal protection analysis. Accordingly, the state must establish both that it has a 'compelling interest' which justifies the challenged procedure and that the distinctions drawn by the procedure are necessary to further that interest. [Citation.]" (*Id*. at p. 465.) It held, based on equal protection principles, that "persons committed to a state institution following acquittal of a criminal offense on the ground of their insanity cannot be retained in institutional confinement beyond the maximum term of punishment for the underlying offense of which, but for their insanity, they would have been convicted." (*Id*. at p. 467.)

electorate." (*Id*. at p. 1210, fn. omitted.) The trial court must "determine not whether the statute is wise, but whether it is constitutional." (*Id*. at p. 1211, fn. omitted.)

Following proceedings on remand and subsequent appeal, the Fourth District, Division One, issued *People v. McKee* (2012) 207 Cal.App.4th 1325 ("*McKee II*"). The Supreme Court denied McKee's petition for review (review denied Oct. 10, 2012, S204503). The *McKee* case on remand is now final.

On remand, "[f]ollowing a 21–day evidentiary hearing, the trial court concluded the People met their burden to justify the disparate treatment of SVP's under the standards set forth in *McKee*." (*McKee II*, *supra*, 207 Cal.App.4th at p. 1330.) On appeal to the Fourth District, Division One, McKee contended that "the trial court erred by finding the People met that burden." (*Ibid*.) The appellate court concluded "the trial court correctly found the People presented substantial evidence to support a reasonable perception by the electorate that SVP's present a substantially greater danger to society than do MDO's or NGI's, and therefore the disparate treatment of SVP's under the Act is necessary to further the People's compelling interests of public safety and humane treatment of the mentally disordered." (*Id*. at pp. 1330-1331.)

In *McKee II*, the appellate court examined evidence in three areas: recidivism, the greater trauma of victims of sexual offenses, and the diagnostic and treatment differences. (*McKee II*, *supra*, 207 Cal.App.4th at pp. 1340-1347.) With respect to recidivism, the appellate court concluded that the Static–99 evidence supported "by itself, a reasonable inference or perception that SVP's pose a higher *risk* of sexual reoffending than do MDO's or NGI's." (*Id*. at p. 1342.) That evidence included Department of Mental Health data "showing a significant difference between the Static–99 scores of SVP's and those of MDO's/NGI's." (*Id*. at p. 1341.) "The average Static–99 score for all SVP's civilly committed since the passage of the amended Act in 2006 [was] 6.19," which "place[d] SVP's in the 'high' risk category for sexual reoffense." (*Ibid*.) In contrast, the average

Static–99 score for MDO's at Patton State Hospital subject to sex offender registration requirements in 2010 was only 3.6, which placed them "in the 'moderate-low' risk category for sexual reoffense." (*Ibid*.) The average Static–99 score for all patients discharged from Atascadero State Hospital since January 1, 2010 and subject to sex offender registration requirements, a group including MDO's and NGI's, was 4.6, which placed them "in the 'moderate-high' risk category for sexual reoffense." (*Id*. at pp. 1341-1342.)

In *McKee II*, the appellate court further concluded that there was "substantial evidence supporting the reasonable perception that the nature of the trauma caused by sex offenses is generally more intense or severe than the trauma caused by nonsex offenses and is sometimes unique to sex offenses." (*Id*. at p. 1343.) It discussed the evidence supporting its conclusion. (*Id*. at pp. 1342-1343.)

McKee II also determined that there was "substantial evidence to support a reasonable perception by the electorate that SVP's have significantly different diagnoses from those of MDO's and NGI's, and that their respective treatment plans, compliance, and success rates are likewise significantly different." (*Id*. at p. 1347.) The distinctions made SVP's more difficult to treat and less likely to participate in treatment. (*Ibid*.) SVP's were "less likely to acknowledge there is anything wrong with them, and more likely to be deceptive and manipulative." (*Ibid*.)

The evidence discussed in *McKee II* indicated that "[o]nly 2 percent of MDO's and NGI's suffer from pedophilia or other paraphilia" whereas "nearly 90 percent of SVP's are diagnosed with pedophilia or other paraphilias." (*McKee II*, *supra*, 207 Cal.App.4th at p. 1344.) "Dr. David Fennell, a psychiatrist and chief of forensics at Atascadero State Hospital, testified that about 90 percent of MDO and NGI patients suffer from a psychotic mental disorder" but "only 1 to 3 percent of SVP's suffer from a psychosis." (*Ibid*.)

There was also evidence that "[p]araphilia typically remains stable or constant throughout a patient's lifetime." (*Id*. at p. 1345.) "Although there may be an 'aging out' effect where patients' behavior or acting out on their fantasies is decreased as they age, that does not mean their urges and fantasies are similarly decreased. Patients with paraphilia generally have a specific intent in selecting victims (e.g., boys age seven to 10 years) and carefully plan and execute their offenses (e.g., by 'grooming' their victims before committing the offense). In contrast, patients with severe mental illnesses generally are not that organized and commit impulsive or opportunistic offenses." (*Ibid*.)

The appellate court in *McKee II* reviewed the evidence of significant differences in the treatment of severely mentally ill patients and patients with paraphilia. "Patients with severe mental illnesses generally are first treated with psychotropic medications and then with psychosocial support or intervention (e.g., therapy regarding communication skills, social skills, and problem-solving). Their amenability to and compliance with treatment usually is very good. Most severely mentally ill patients are compliant with their medications and participate in treatment most of the time. In comparison, the treatment plans for patients with paraphilia generally involve psychosocial intervention-like treatment. Medications may decrease their sexual arousal, but not their deviant sexual interests. Treatment of paraphilia patients takes longer than for other patients because paraphilia is so pervasive, affecting their thoughts, beliefs, and interactions. . . . Also, a higher percentage of SVP's (i.e., 10 to 15 percent) have antisocial or borderline personality disorders (i.e., involving pathological lying and instability, etc.) than do severely mentally ill patients, making their treatment more difficult. Also, unlike severely mentally ill patients, 'not very many' SVP's are ready to work and participate in treatment." (*Id*. at p. 1346.)

Dr. Fennell also testified regarding the differences between treatment plans for SVP's and those for MDO's and NGI's. (*Id*. at p. 1345.) "MDO's, most of whom are

housed at Atascadero, are overwhelmingly treated with psychotropic medications, resulting in their stabilization and amenability to psychosocial support treatment. About two-thirds of MDO's and NGI's comply with their treatment programs, typically resulting in their decertification after about three years." (*Id*. at pp. 1344-1345.) In contrast, "SVP's treatment plans are not based on medications, but rather on giving them the tools to limit their risk of sexually reoffending." (*Id*. at p. 1345.) "The shortest time in which an SVP has completed treatment is two and one-half years. Many other SVP's took up to five years to complete treatment."(*Ibid*.) But "only about 25 percent of SVP's participate in treatment." (*Ibid*.)

McKee II concluded "the People on remand met their burden to present substantial evidence, including medical and scientific evidence, justifying the amended Act's disparate treatment of SVP's (e.g., by imposing indeterminate terms of civil commitment and placing on them the burden to prove they should be released). (*McKee*, *supra*, 47 Cal.4th at p. 1207 . . . .)" (*McKee II*, 207 Cal.App.4th at p. 1347.) It held that the SVPA as amended did not "violate McKee's constitutional equal protection rights." (*Id*. at p. 1348.)

Appellant Wallace has not demonstrated that the appellate court in *McKee II* incorrectly concluded that there was a compelling state interest justifying the differential treatment of SVP's as compared to MDO's and NGI's. Appellant has not made any argument to show that a different conclusion would pertain as to the differential treatment of SVP's as compared to persons subject to LPS "mental health" conservatorships.[10]

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[10] "[F]or the purposes of Chapter 3 (commencing with Section 5350), 'gravely disabled' means either of the following: [¶] (A) A condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter. [¶] (B) A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist: [¶] (i) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to

Finally, appellant is not similarly situated to persons committed under the former MDSO Act, which was "the forerunner of the SVP Act" (*McKee*, *supra*, 47 Cal.4th at p. 1196). (Cf. *Dobbert v. Florida* (1977) 432 U.S. 282, 301-302 [97 S.Ct. 2290] [petitioner who was sentenced to death under a new statute was not similarly situated to other state prisoners whose death sentence was commuted to life imprisonment because they had been sentenced under an unconstitutional death penalty provision of a different statute]; *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [31 S.Ct. 490] ["the 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time"]; *Baker v. Superior Court* (1984) 35 Cal.3d 663, 668-670 [extension of involuntary commitment of a mentally disordered sex offender (MDSO) who was committed before the repeal of the MDSO law and remained subject to the former law was not a denial of equal protection even though persons convicted of a sex offense after repeal were sentenced to a determinate prison term and not subject to extended commitment].)

The equal protection claim advanced by appellant fails. A remand for a further evidentiary hearing is not required.

E. *No Violation of Ex Post Facto or Double Jeopardy Clause*

Appellant contends that his indeterminate term of commitment as an SVP violates the federal constitutional prohibitions against ex post facto laws and double jeopardy. He asserts that the "changes made to the SVPA by the 2006 Amendments result in a punitive statute" and his commitment constitutes additional criminal punishment.

Article I, section 10, of the United States Constitution provides in pertinent part: "No State shall . . . pass any . . . ex post facto Law . . . ." "The *Ex Post Facto* Clause,

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the physical well-being of another person. [¶] (ii) The indictment or information has not been dismissed. [¶] (iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner." (§ 5008, subd. (h)(1).)

which ' "forbids the application of any new punitive measure to a crime already consummated," ' has been interpreted to pertain exclusively to penal statutes. [Citation.]" (*Kansas v. Hendricks* (1997) 521 U.S. 346, 370 [117 S.Ct. 2072].)

The double jeopardy clause of "[t]he Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment (*Benton v. Maryland* (1969) 395 U.S. 784, 793-796 [89 S.Ct. 2056 . . .]), protects defendants from repeated prosecution for the same offense [citations], by providing that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb. . . .' " (*People v. Batts* (2003) 30 Cal.4th 660, 678.) "[T]he Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, ' "in common parlance," ' be described as punishment. [Citations.]" (*Hudson v. U.S.* (1997) 522 U.S. 93, 98-99.) It "protects only against the imposition of multiple *criminal* punishments for the same offense [citations], and then only when such occurs in successive proceedings [citation]." (*Id*. at p. 99.)

A judicial determination that a law is not punitive "removes an essential prerequisite" for both double jeopardy and ex post facto claims. (*Kansas v. Hendricks, supra*, 521 U.S. at p. 370.) In *McKee*, the Supreme Court concluded: "[T]he nonpunitive objectives of the [SVP] Act—treatment for the individual committed and protection of the public—remain the same after Proposition 83. Moreover, under the Act after Proposition 83, as before, a person is committed only for as long as he meets the SVP criteria of mental abnormality and dangerousness. As such, the Proposition 83 amendments at issue here cannot be regarded to have changed the essentially nonpunitive purpose of the Act." (*People v. McKee, supra*, 47 Cal.4th at p. 1194.)

After considering "the seven-factor test articulated in *Kennedy v. Mendoza–Martinez* (1963) 372 U.S. 144, 168-169, 83 S.Ct. 554" (*id*. at p. 1195), the Supreme Court held that "the Proposition 83 amendments do not make the Act punitive and

accordingly do not violate the ex post facto clause." (*Ibid*.) This court is governed by the Supreme Court's holding. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.) The court's determination that the SVPA is not punitive is also dispositive of appellant Wallace's double jeopardy claim.

DISPOSITION

The September 15, 2011 order of commitment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.